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IN THE

Supreme Court of the United States

October Term, 1944.

No. 182.

THE PENNSYLVANIA RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, D. A. STICKELL & SONS, *Inc.*, *Appellees*.

Appeal from the District Court of the United States for the District of Maryland.

APPELLANTS' REPLY BRIEF.

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January 9, 1945.

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THE PENNSYLVANIA RAILROAD COMPANY;
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY;
THE BALTIMORE AND OHIO RAILWAY COMPANY;
CHARLES M. THOMSON, As Trustee of the Property of The Chicago and Northwestern Railway Company, A Corporation;
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY (Henry A. Scandrett, Walter J. Cummings, and George I. Haight, Trustees);
JOSEPH B. FLEMING AND AARON COLNON, Trustees of The Chicago, Rock Island and Pacific Railway Company;
LOUISVILLE AND NASHVILLE RAILROAD COMPANY;
G. W. WEBSTER AND JOSEPH CHAPMAN, Trustees of Minneapolis, St. Paul & Sault Ste. Marie Railway Company;
GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor;
THE NEW YORK CENTRAL RAILROAD COMPANY;
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY;
SOUTHERN RAILWAY COMPANY;
WABASH RAILROAD COMPANY; *Appellants,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
D. A. STICKELL & SONS, INC., *Appellees.*

Appeal from the District Court of the United States for the District of Maryland.

APPELLANTS' REPLY BRIEF.

The following brief is respectfully submitted in reply to the Brief for the United States and the Interstate Commerce Commission, herein for convenience termed the Government's brief, and to the Brief of appellee D. A. Stickell & Sons, Inc., herein termed Stickell's brief. They will be collectively referred to as appellees' briefs.

Reply to Point I of Appellees' Briefs.

The actual interpretation placed by the Commission on clause (b) of Section 15(4) of the Interstate Commerce Act, upon the correctness of which the validity of its order primarily depends, is that such clause becomes operative as an exception to the short hauling restriction on the Commission's power to prescribe through routes if the proposed new route would advantage an individual transit operator located between the points of origin and destination of such through route, who would employ it not for through transportation but primarily to obtain the application of a lower rate on separate shipments moved into and out of its mill under a transit arrangement, and without regard to whether the proposed through routes would be less efficient or less economic of operation than the existing routes.

The Government's brief is therefore inaccurate in stating (p. 3) the question as whether clause (b) becomes operative on a finding that the new through route is "needed to provide 'adequate, and more efficient or more economic, transportation' from the standpoint of service to the shipping public, * * *." Service to the shipping public in respect of through routes would seem to connote through and continuous physical transportation service between the points of origin and destination of the through routes. But however this may be, the public, as the ultimate bearer of the expense of providing transportation, has a real and definite interest in having transportation performed in the most efficient and economic manner and in avoiding the estab-

lishment of new through routes of an inefficient or uneconomic character even though they might advantage an individual shipper. While the Commission found that the new through routes would result in a reduction of freight charges to the Hagerstown transit operator, it made no finding that their establishment would result in a more efficient or more economic railroad operation than was provided by the existing routes between the points of origin and destination.

The form of the Commission's statement of its interpretation of clause (b) appears to be responsible for the misstatement of the essential question of law involved and to explain the failure of the Commission and of the Court below to realize that efficient and economic transportation from the standpoint of the performance of the physical operation is very definitely needed in the public interest.

Thus, in concluding its discussion of clause (b) the Commission (R. 40) stated: "We interpret that exception to mean adequate and more efficient and more economic from the public's or shippers' as well as the participating carriers' standpoint." What the Commission actually meant by this statement, as indicated by the manner in which it applied the exception to the facts before it, was that if the new routes were generally advantageous to the Hagerstown transit operator which would thereby obtain a lower total rate on its combined inbound and outbound shipments, the Commission was free, in invoking the clause (b) exception, to disregard all matters of efficiency or economy in operation. The expression "as well as" was used not in a conjunctive but in a disjunctive sense. That is to say, the Commission in terms interpreted clause (b) as operative as an exception to the short hauling restriction if the new through routes should prove of advantage to the public, *or* to an individual shipper or transit operator, *or* to the participating carriers.

An analysis of the reason urged by the Government in support of this construction, upon which the order involved

is based, requires the conclusion that it is erroneous as a matter of law. Thus, at pages 28-30 of its brief the Government refers to the rule of rate making contained in Section 15a (2) of the Interstate Commerce Act, 49 U. S. C. §15a (2), as the source and explanation of the language used in clause (b). Except for the inclusion in 1940 of a clause which is not here important, the present provision is the same as that enacted in the Emergency Railroad Transportation Act, 1933 (48 Stat. 211, 220). As then enacted paragraph (2) read:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

Based on the foregoing language the Government, in effect, argues that clause (b) in its use of the expression "needed in order to provide adequate, and more efficient or more economic, transportation" necessarily means the same as the reference in Sec. 15a (2) to the "need, in the public interest, of adequate and efficient railway transportation service"; that it cannot be said that the *carriers* need such service; that obviously *shippers* need such service; and that therefore the Commission properly construed and applied clause (b) as operative to make inapplicable the short-haul restriction where the new through route would advantage the Hagerstown transit operator mainly by affording it a lower charge on its transited shipements. This argument was accepted and adopted by the Court below (R. 90-91).

The Government's argument in this respect, as well as the acceptance of it by the District Court, is in error for two principal reasons. It assumes that it is the policy of

Congress to make the interest of an individual shipper or transit operator paramount to the interest of the shipping public or the general public. That is to say it assumes that Congress in enacting clause (b) meant to make the short hauling restriction inapplicable if a new through route would produce a lower charge for a transit operator even though such route might involve a less efficient or less economic transportation operation, the expense of which would ultimately be saddled on the general or shipping public. That such an assumption is directly contrary to the developing policy of Congress in respect of transportation is indicated by the opinions of this Court in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24-25, and *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 80-81, quoted at pages 38, 40-41, of appellants' main brief.

The second principal error involved in the Government's argument in this respect is in misinterpreting the very provision of Section 15a (2) upon which it would rely. Thus, reference to that paragraph as quoted above discloses that the full clause contains words in addition to those which the Government's brief particularly quotes, and which not only do not support its contention but confirm the interpretation for which these appellants contend. Thus, the second clause of Sec. 15a (2) requires the Commission to give due consideration to the need, in the public interest, of adequate and efficient railway transportation service at the lowest *cost* consistent with the furnishing of such service.

This use of the word "cost," which necessarily refers to *costs of operation* as distinguished from tariff rates, was not the result of mere inadvertence. This appears from a consideration of its legislative history. Thus, Section 15a (2) of the Interstate Commerce Act, as amended by the Emergency Railroad Transportation Act, 1933, approved June 16, 1933 (48 Stat. 211, 220), was based on Senate Bill 1580. Reference to the same provision of the bill as introduced, and set out at page 6 of the Hearings before

the Senate Committee on Interstate Commerce, 73rd Congress, 1st Session, shows that it was enacted in the original form. As so introduced the provision was the same as in H. R. 11642, 72nd Congress, 1st Session, as indicated by H.R. Report No. 1386 of May 19, 1932, at page 4. H.R. 11642 had superseded H.R. 7117, 72nd Congress, 1st Session, which was the subject of hearings before the House Committee on Interstate and Foreign Commerce, 72nd Congress, 1st Session, at which Commissioner Eastman testified at some length. At page 454 of the latter Hearings will be found an amendment proposed by him, the corresponding portion of which would have read:

> "(2) In the exercise of its power to prescribe just and reasonable rates, the commission shall give due consideration, among other things, to the present and prospective needs of the public for adequate and efficient transportation facilities and service, to the effect of rates on the movement of traffic, and to the necessity, in the public interest, that the carriers furnish transportation service at the lowest *rates* consistent with adequate service and adequate provision for the transportation needs of the public." (Italics inserted).

The reason for the use of the word "cost" in Section 15a (2) in this connection, rather than the word "rates" as proposed by Commissioner Eastman, is shown by the questions of Congressmen Hoch and Huddleston and the responses of Commissioner Eastman which follow the reference to his proposed amendment, and particularly at pages 459, 463, and 464 of the printed Hearings on H.R. 7117, which indicate that the intended reference was to "the cost of service to the carriers." (Hearings, H.R. 7117, p. 460). For convenience, the questions and answers of Congressman Huddleston and Commissioner Eastman which appear at pages 463-464 of those Hearings are reproduced in the Appendix hereto.

It is therefore submitted that whether or not the language of clause (b) may have been borrowed in part from Section 15a (2), or whether it merely had a common origin

with it it in the national transportation policy as developed by the Congress and recognized in the decisions of this Court, it is not operative as an exception to the short hauling restriction unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation from the standpoint of *railroad operation*. To so hold does not mean that Congress is making the interests of individual railroads paramount to the public interest. On the contrary, an individual railroad might properly be required to participate in a through route which short hauls it, whereby its freight revenues would be reduced, if the Commission were to find the existing transportation inadequate and that the proposed route would permit of a more economic or more efficient operation the benefits of which would inure to the public through securing performance of the transportation for a lesser ultimate cost.

The Government further argues (p. 36) that the Commission's construction of clause (b) is entitled to much weight as the contemporaneous construction by the administrative agency entrusted with the responsibility of setting in motion the machinery of a new Act, with the enactment of which the Commission had much to do. Its argument in this respect is squarely met by the recent holding of this Court on a similar argument in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 156:

> "4. Lastly, it is contended that we should accept the Administrator's view in deference to administrative construction. The administrative ruling in this case was no sooner made than challenged. We cannot be certain how far it was determined by the considerations advanced, mistakenly as we think, in its defense in this case. It has hardly seasoned or broadened into a settled administrative practice. If Congress had deemed it necessary or even appropriate that the Administrator's order should in effect be final in construing the scope of the national price-fixing policy, it would not have been at a loss for words to say so."

The Government's argument to the effect that the legislative history of clause (b) supports the interpretation adopted by the Commission and sustained by the Court below is plainly unsound. In short it is that Section 15(4), as finally passed in the Transportation Act of 1940, was a compromise between a Senate Bill which would have removed the short-hauling restriction entirely, and a House Bill which would have left the restriction completely intact, and that since the carriers, which had opposed the complete removal of the short-haul restriction, were given some protection in the bill as enacted against being required to participate in the establishment of new through routes for the purpose of diverting revenues to impecunious short lines, the other amendments of paragraph (4) should be read as intended otherwise to accede completely to the views of the shippers which sought elimination of the short-haul rule. If not so construed, the Government would conclude that "this compromise netted shippers practically nothing." (p. 21, Cf. p. 46).

This argument will not stand analysis for two reasons. It disregards the fact that the construction of clause (b) for which appellants contend represents a distinct relaxation of the short-haul restriction in that the latter becomes inapplicable whenever the Commission finds that existing routes do not provide adequate transportation and that the proposed routes are needed in the public interest to provide adequate transportation and to permit of its accomplishment by the carriers with greater efficiency or economy of operation.

The other reason for the inadmissibility of the Government's argument in this respect is that the construction for which it contends would effectually repeal the short hauling restriction itself. While the Government's brief (p. 34), like the opinion of the Court below (R. 93), denies that this would be so, it is apparent from both that the result would be otherwise than they assert. Thus, the Government argues (p. 35) that Section 15(4) would protect a railroad from

being short hauled by the establishment of through routes to aid a weak short-line carrier. But the prescription of new through routes for this purpose was specifically forbidden by other language inserted in paragraph (4) in 1940. Thus, the example employed by the Government, to show that its interpretation of clause (b) would leave the short hauling limitation a remaining field within which to operate, not only fails to prove its point, but affirmatively disproves it. If the short-haul rule were to have application only in such an instance as the Government suggests, there would have been no need to retain it in view of the contemporaneous enactment of a specific prohibition against establishing through routes to divert revenues to needy railroads. As pointed out in appellants' brief (p. 34), in probably every case the prescription of through routes would provide some shipper or transit operator with a lower rate, i.e., lower over the particular route if not lower than over existing routes, and therefore the interpretation which the Commission's actual decision herein places on the exception contained in clause (b) would make the exception of general application and the short-haul rule itself of no effect.

The reason given in the opinion of the Court below (R. 93)—quoted in the Government's brief (p. 35)—to avoid the conclusion that the Commission's interpretation, which it upheld, would effect the virtual repeal of the short-haul rule, is unsound and illogical. Thus, if clause (b) is operative to set aside the short-haul rule whenever an individual shipper or transit operator is able to prove that the proposed new route would give him cheaper service, and if matters of railroad operating efficiency and economy are to have consideration only in the initial determination of "public interest" under Section 15(3), then indeed is the short-haul limitation repealed by construction in spite of the specific rejection by Congress of all proposals therefor.

What is said above in reply to Point I of the Government's brief will in general also furnish reply to Point I of Stickell's brief. As to the latter, one additional feature may be noted.

At page 14 et seq. of Stickell's brief there is the intimation that the propriety of the establishment of the back-haul arrangement may be open to question. This is incorrect. The transit arrangement at Hagerstown was established in 1921 by the Pennsylvania at the specific request of Stickell, and it was understood that there would be a back-haul charge in addition to the transit charge. At that time, as at the present, these charges totaled 5 cents (4.5 + 0.5 cents) on traffic from west of Pittsburgh. Stickell specifically expressed agreement with this arrangement. (Ex. 45, R. 409-410, 272, 338).

That establishment of a transit arrangement in such an instance as this was for the advantage of the transit operator and in line with approved practice as indicated by the statement of the Commission in *Josey-Miller Co.* v. *A. T. & S. F. Ry. Co.*, 136 I. C. C. 379, 381 where the Commission stated:

> "Out-of-line and back-haul services are primarily for the purpose of assisting shippers disadvantageously located to meet the competition of others more favorably situated, and, being costly, defendants object to further extending them."

That back-hauls are not unusual, but rather that they apply frequently where out-of-route or back-haul service is necessary in connection with transit, is shown by Exhibit 51, (R. 418-430, 286-289, 338) and was recognized by the Commission (R. 31) and by the Court below (R. 98).

Reply to Point II of Government's Brief and Portions of Point II of Stickell's Brief.

Under this point the Government's brief undertakes to answer appellants' contention (pp. 68-72) that the comparisons contemplated by clause (b) are as between the proposed routes and the existing *direct* routes rather than with the Pennsylvania's routes via Hagerstown. The Government's brief then argues (p. 23) that the phrase "between

the termini" which appears in the short-hauling restriction has no relation to the comparison of efficiency or economy contemplated by clause (b) for the reason that such phrase is not used in that clause. If this were a valid argument, the same could be said of clause (a) which makes the short-hauling restriction inapplicable if preservation of a carrier's long haul would make the route unreasonably long as compared with another practicable through route which could otherwise be established. Yet the Commission has recognized that the comparison contemplated by clause (a) should be as between the proposed routes and the existing *direct routes* of the Pennsylvania. Thus, in turning to clause (b) as a basis for escaping the limitation of the short-haul rule in the instant case, the Commission first considered the possible applicability of clause (a) and stated (R. 34):

> "It is evident that the Pennsylvania's *direct route* is not unreasonably long and that the prescription of either route 1 or 2 would require the Pennsylvania to embrace in such route substantially less than the entire length of its railroad which lies between the termini of such route." (Italics inserted).

The Commission made no finding as to whether the Pennsylvania's Hagerstown routes were or were not unreasonably long as compared with the proposed through routes. Yet if the Pennsylvania's Hagerstown routes furnished the proper standard of measurement under clause (a), doubtless the Commission would have made a finding with respect thereto. That it did not do so indicates that the proper comparison of the efficiency and economy of the proposed through routes is with the direct routes of the Pennsylvania rather than with its routes via Hagerstown. Nevertheless, as set forth in appellants' main brief (pp. 89-108), the carriers' evidence showed that even with such a comparison the proposed routes were less efficient and less economic than the Hagerstown routes of the Pennsylvania. For further reply to point II, appellants respectfully invite at-

tention to what is said in their main brief at pages 68-72.

What has here been said in reply to Point II of the Government's brief will also serve as a reply to the portion of Point II of Stickell's brief at pages 27-30.

Two additional matters in this portion of Stickell's brief may here be commented upon. At pages 23 and 30 the point is sought to be made that the relative shortness of the elapsed time of transportation *from Hagerstown to destination* over various routes is of importance to Stickell in the marketing of its mixed feed products. But the comparison of relative efficiency which clause (b) doubtless contemplates is of the through-routes as entireties from origin to destination of the joint rate as ultimately applied on the combined shipments. Under the transit arrangement at Hagerstown, Stickell may hold grain or its products for a year before shipping out the mixed feed products.

At pages 31 and 33 the Stickell brief refers to the evidence introduced by defendants before the Commission, including appellants here, comparing the cost of service over the present and proposed routes, as if that evidence were directed to proving precise or actual costs of handling an individual commodity. Since clause (b) appears to contemplate a comparison of the efficiency and economy of *routes*, the cost evidence introduced was directed to comparing the routes upon the basis of the relative cost of service for the system lines involved using the same method of computation as applied to the data for each road reported by it to the Interstate Commerce Commission and employing a formula suggested by a member of the Commission's own statistical staff (Ex. 68-69, R. 351-358).

Reply to Point III of Government's Brief and Portions of Point II of Stickell's Brief.

For reply to what is said at pages 50-51 of the Government's brief concerning Stickell's shipments by rail and truck via Elsmere Junction, appellants respectfully refer to what is said in their main brief at pages 83-84, 99-100.

At page 26 of Stickell's brief exception is taken to appellants' reference to the reason for Stickell's use of the rail truck route via Delsmere Junction (Wilmington), Delaware, and the suggestion is made that appellants have improperly injected this matter into the case. A witness offered by Stickell attributed the making of the rail-truck shipments to the poor rail service of the Pennsylvania from Hagerstown, (R. 219) but admitted that this tonnage was transit tonnage "as far as Delsmere" (R. 224). Since no through-routes are in effect over the Pennsylvania to Hagerstown and outbound over the Western Maryland and Reading to Delsmere Junction, transit billing covering inbound shipments over the Pennsylvania to Hagerstown could not have been used on the rail-truck shipments to Delsmere. Necessarily the only billing which could have been used was that which had been received at Hagerstown over the Western Maryland having been received by it from other connections. But the inbound billing on such grain was not eligible to support outbound shipments from Hagerstown over the Pennsylvania. See in this connection the footnote at page 100 of appellants' main brief.

The Government's argument (p. 52) that the comparison of efficiency under clause (b) may properly be limited to the portions of the proposed and existing routes *from Hagerstown* to destination, to the exclusion of any comparison of the proposed and existing routes in their entirety between points of origin and destination, will not square with the language and obvious intent of clause (b). Thus, the Government quotes the Court below (R. 98) as saying: "* * * what Stickell is most concerned with is prompt delivery of its products." But for the reasons set forth in the foregoing Reply to Point I, as well as in appellants' main brief (pp. 31-33, 37-43), the Congress in enacting clause (b) was making paramount the general public interest rather than the possible advantage of an individual shipper or transit operator. The general public, which

ultimately bears the burden of uneconomical or wasteful transportation, and which ultimately secures the benefit of economic and efficient transportation, is obviously interested in the operating efficiency and economy of the proposed through routes *in their entirety* as compared with the existing routes.

The foregoing paragraph will also serve as a reply to that portion of Point II of Stickell's brief which appears at pages 30-31.

For answer to the remaining portions of the Government's brief under this point, appellants' respectfully refer to their main brief page 88 et seq.

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APPENDIX.

Excerpt from Printed Hearings Before House Committee on Interstate and Foreign Commerce, 72nd Congress, 1st Session, on H.R. 7116 and 7117 (Pages 463-464).

"Mr. Huddleston. Mr. Eastman, in deciding upon what is a just and reasonable rate, does the commission consider the cost to the carrier of the service?

"Commissioner Eastman. It does, whenever it has evidence in regard to that matter before it. That is difficult evidence to procure. In an increasing number of important cases it is submitted to the commission. Such evidence has been presented to the commission in an increasing number of cases. In the ordinary case of small scope, no evidence of that kind is presented. The usual evidence in such cases takes the form of rate comparisons, and rate comparisons have furnished the supporting evidence on both sides in the great majority of cases considered by the commission. But, as I say, in an increasing number of cases an attempt has been made to furnish studies of what the cost to furnish the particular service is. Now, that is a very difficult matter, and when such cost studies are presented, we find that, as a rule, they are criticized by both parties and very often the criticisms are valid.

"Mr. Huddleston. Is that factor included in any of the clauses in this proposed amendment that you have submitted?

"Commissioner Eastman. Included in what?

"Mr. Huddleston. Is that covered by any of the provisions of this proposed amendment?

"Commissioner Eastman. Well, it is included in the expression 'just and reasonable rates,' and, of course, we are largely talking in this paragraph 2 about the general rate level. So far as a general rate level is concerned, the cost of service is reflected by the operating results of the carriers. It is clear as to what the cost of the entire service is. What we lack is the cost of the hauling of particular commodities or between particular points.

"Mr. Huddleston. The provision that 'in the exercise of its power to prescribe just and reasonable rates' seems to include fixing of particular rates as well as the general rate level.

"Commissioner Eastman. Yes, I think that that is true.

"Mr. Huddleston. My thought is that the ideal rate is a rate which covers the cost of service performed, plus whatever profit might be considered fair. Looking at this, it seems to me that that thought is altogether ignored.

"Commissioner Eastman. Well, of course, under the doctrine which has prevailed in the past, it is necessary to consider, not only cost of service, but value of service, and that means that some traffic will carry a greater part of the burden than other traffic. Under the decisions of the Supreme Court we can not require a railroad to carry any kind of traffic at less than cost, but I think we are at liberty to fix rates so that a greater amount of profit is obtained from certain forms of traffic than from other forms.

"Mr. Huddleston. And that other kinds of traffic may be carried at a loss?

"Commissioner Eastman. Not at a loss, under the decisions of the Supreme Court, if we know what the cost is.

"Now, as I say, when you get into the realm of cost, you are getting into a very difficult matter, and for this reason: When it comes to determining what the costs of carrying a particular kind of traffic are, or of carrying traffic between particular points, you have got to apportion a lot of items of expense which are incurred in common for a good many different forms of service, and these apportionments have to be made on a more or less arbitrary basis—that is where the dispute comes, as to whether those methods of apportioning expenses incurred in common for different kinds of service are reasonable methods of apportionment, and I assure you there is a tremendous opportunity for debate in regard to those matters.

"Mr. Huddleston. I have heard it said that in fixing the fundamental base of rates on which all rates are formed, practically, no attention has been given to the cost of the service.

"Commissioner Eastman. Well, I think the railroads have not attempted in general to determine what are the costs of hauling particular commodities, or traffic between particular points. I think that they do have various rule-of-thumb measurements in their mind which influence them in making rates. I know one particular road which has worked out some average ton-mile costs, and its traffic department is instructed in making rates to keep those average costs in mind and not to go below them without very careful consideration. A certain rule-of-thumb measurement of that kind I think is used, but it is quite true that there has not been an attempt to ascertain costs in the way in which many other industries at the present time attempt it, by means of a complete system of cost accounting."